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IN THE

Supreme Court of the United States

No. 75-927

PATRICIA HOGGE, EARLE PHILLIPS
T/A PARADISE MASSAGE PARLOR, AND BO-JAC, LTD.
Petitioners,

v.

C.E. JOHNSON, CITY MANAGER, AND PATRICK G. MINETTI,
CHIEF OF POLICE, CITY OF HAMPTON, VIRGINIA,
EACH IN THEIR OFFICIAL CAPACITY
Respondents,

SCARLETT ANNE HILLIARD AND EARLE PHILLIPS,
FRENCH MASSAGE PARLOR
Petitioners,

v.

WILLIAM E. LAWSON, CITY MANAGER, AND HOWARD B.
BLACKMON, CHIEF OF POLICE, CITY OF NEWPORT NEWS,
VIRGINIA, EACH IN THEIR INDIVIDUAL CAPACITY
Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS MEMORANDUM IN RESPONSE

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OCTOBER TERM, 1975

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PETITIONERS MEMORANDUM IN RESPONSE

I. RESPONDENTS' STATEMENT OF THE CASE IS INCOMPLETE AND MISLEADING

Respondents' Statement of the Case obfuscates the facts and the procedural history of this case with respect to the individual parties. The purpose of this section is to clarify the

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status of the various parties in the two separate and distinct cases before the Court in this Petition.

Submissions requested by the District Court of the City Attorney for Hampton and the City Attorney for Newport News specified every prosecution initiated in those cities under the ordinances challenged in these cases. The submission on the part of the city of Hampton shows that *none* of the parties to the Hampton suit were ever prosecuted at any time for violation of the Hampton ordinance. Bo-Jac, Ltd. was a party to a civil suit initiated in state court; however, since the merits were never reached in that action, the Circuit Court for the City of Hampton entered a non-suit without prejudice to either party.

In Newport News, subsequent to the filing of the Newport News suit, prosecutions were initiated against Earle Phillips, but the city of Newport News at no time requested that the suit in the District Court be stayed pending the outcome of these prosecutions. Nor did it assert that the outcome of those prosecutions in any way barred or effected the proceedings in the District Court.[1] Finally, the other party in the Newport News suit, Scarlett Hilliard, has never been arrested or charged with a violation of the Newport News ordinance.

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[1] Since the abstention doctrine turns upon the concept of comity *Younger v. Harris*, 401 U.S. 37, 44 (1971) where the state fails to assert its relevant interest such failure is tantamount to a waiver of that interest.

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II. RESPONDENTS' ARGUMENT THAT SUMMARY DISMISSAL BY THIS COURT IN ONE CASE PRECLUDES OTHER PARTIES IN OTHER CASES FROM RAISING ARGUMENTS WHICH WERE NOT IN THIS COURT CLEARLY CONFLICTS WITH THIS COURTS' DECISION IN *HICKS v. MIRANDA*, 422 U.S. 322 (1975)

In their Reply Respondents acknowledge that "innovative new arguments" were presented in this case[2] (Brief for Respondents' in Opposition, p. 6); nevertheless, they assert that, even though a party raises a new contention which has not been decided before, that party should not be given an opportunity to litigate this untried theory if this Court has summarily dismissed, for want of a substantial federal question, another case which raises the same general issue but presents different issues as the basis for the constitutional attack. (Respondents' Brief in Opposition, p. 8) In support of this argument the Respondents cite this Court's decision in *Hicks v. Miranda*, 422 U.S. 322 (1975). Petitioners respectfully submit that this interpretation of *Hicks* clearly misconstrues that decision.

Hicks holds that the significance of a summary affirmance by this Court is limited to those issues which were properly before this Court for consideration:

> Thus has the Court . . . considered itself bound by the summary dismissal of an appeal by the

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[2] It should also be noted that the Court below was of the opinion that a substantial federal question *was* presented.

> [T]he . . . other members of the panel thought, as did I, that there *was* a substantial federal question presented by this case. The question deserves elaboration.

526 F.2d 833, 836 (1975) (Mr. Justice Clark, concurring).

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> Court, its initial task would have been to ascertain what issues were properly presented and declared by this Court to be without substance.

Hicks v. Miranda, supra, at 345, n. 14.

Nothing in the *Hicks* opinion suggests that this Court meant to preclude other parties in other suits from raising issues which had not previously been adjudicated.

Respectfully submitted,

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